This decision has been modified by E[redacted] W[redacted] (1999) SPB Dec. No. 99-09.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	SPB Case No. 31270 and 34027
W[redacted] [redacted]. M[redacted]	**BOARD DECISION** (Precedential)
From demotion from the position of Fire Captain to Fire Apparatus Engineer and dismissal from the position of Fire Apparatus Engineer with the Department of Forestry and Fire Protection at El Dorado County	**NO. 95-13** October 3, 1995

Appearances: William J. Flynn, Attorney, on behalf of appellant, W[redacted] [redacted]. M[redacted]; Kevin F. Hoeke, Attorney, California Department of Forestry and Fire Protection on behalf of respondent, Department of Forestry and Fire Protection.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board granted the Petition for Rehearing filed by W[redacted] [redacted]. M[redacted] (appellant). Appellant petitioned the Board for rehearing after the Board sustained his respective adverse actions of demotion from the position of Fire Captain to the position of Fire Apparatus Engineer and dismissal from the position of Fire Apparatus Engineer with the Department of Forestry and Fire Protection at El Dorado County (Department).[1]

[1] Appellant's adverse actions were combined for hearing before the Administrative Law Judge.

The petition noted that certain findings of fact in the combined decision of the

adverse actions were erroneous and, further, that the Board erred in not finding that appellant's Skelly rights were violated. The Board granted appellant's Petition for Rehearing, asking the parties to brief these issues.

After a review of the administrative record in this case, including the transcript, exhibits, and the written and oral arguments of the parties, the Board sustains both appellant's demotion and dismissal and further finds that appellant's Skelly rights were not violated.

FACTUAL SUMMARY

Appellant has been employed by the Department since 1977. In 1985, he was promoted to the position of Fire Captain. His duties as Fire Captain included responsibility for overseeing the entire fire crew station at any station where he would be assigned.

The Original Demotion

The original demotion served upon appellant on April 1, 1992 made a number of general allegations against appellant concerning inappropriate conduct toward female employees and his poor driving habits. Although the notice of adverse action listed only a few specific instances of misconduct by appellant, it was served with documents which discussed more specifically some of the matters of concern only generally alluded to in the demotion action.

Prior to setting forth the specific acts of misconduct upon which the demotion was based, the notice of adverse action also

cited prior attempts at counselling and noted the issuance by the Department of a counselling memorandum issued as a result of a reckless driving incident. The counselling memorandum was based on a June 18, 1991 incident in which appellant was driving a fire engine with two subordinate firefighters on his way to render medical assistance when he almost caused an accident. Appellant made a U-turn in the middle of the highway in front of a logging truck, causing the two fellow firefighters riding in the engine to fear for their lives. The counselling memorandum issued by his supervisor, Battalion Chief Lee Winton, warned appellant to slow down his driving and consider the health and safety of himself and his employees as the most important priority.

The following specific allegations of misconduct were noted in the notice of adverse action as the basis for the demotion. On October 21, 1991, appellant was assigned to work at Pine Lodge Fire Station and was in charge of two firefighters that day, one of whom was Cameron Smith, a female employee with whom he had not previously worked. Appellant received a call concerning a fire at Weber Creek and started off in the fire engine for the fire with Smith and another employee, David McClellan. As appellant drove up a long steep road, known as Bucks Bar Road, he noticed several vehicles behind him, led by a Volkswagen Bug. He turned right onto Route E-16 which led him down a winding road. As he drove down the road he noticed the Volkswagen Bug pulling up behind him, several

times attempting to pass the fire engine. Appellant failed to slow down to allow the car to pass but, instead, actually sped up far in excess of the speed limit, rendering the situation dangerous for both his fellow passengers and the driver of the Volkswagen.

The demotion further alleged that on the same day as the above incident, appellant pinched Smith's cheek as she got into the fire engine, telling Smith "you are kind of cute for a girl." Later, when Smith was busy mopping up after the fire, Smith complained to appellant that she was "working hard but you guys are on your butt doing nothing." In response to this, appellant grabbed Smith by her shirt collar, pulled her close to his face saying, "Don't even accuse a captain of goofing off." Appellant then let go of Smith and walked away.

Based upon the foregoing incidents, the Department demoted appellant from Fire Captain to Fire Apparatus Engineer effective April 15, 1992, citing causes for discipline under Government Code section 19572 subdivisions (d) inexcusable neglect of duty, (f) dishonesty, (m) discourteous treatment of the public or other employees, (o) willful disobedience and (t) other failure of good behavior.

The Amended Demotion

During the hearing on the demotion, the ALJ raised the fact that, other than the specific incidents listed above, many of the

allegations in the demotion were plead in a very general manner[2] and, that, without specific factual details of the incidents, general allegations could not serve as the basis for adverse action. Leah Korman (1991) SPB Dec. No. 91-04.[3] As a result of this discussion, the Department served appellant with an amended notice of adverse action of demotion on April 26, 1994.

The department amended the action to state that, in addition to the written memorandum of informal counselling received by appellant with respect to the logging truck incident, appellant received counselling on numerous occasions throughout 1989, 1990 and 1991 regarding inappropriate behavior towards female employees and his poor driving habits. The amended notice also alleged that during the summer of 1991, appellant received counselling on a weekly basis from Chief Lee Winton, addressing these same topics. The amended action further alleged that appellant was repeatedly warned that continued incidents of such misconduct could form the basis for formal discipline.

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[2] For example, the original notice of adverse action of demotion informed appellant that "...you have repeatedly touched different female firefighters in an inappropriate manner..." and that "...in general, you have conducted yourself in an unbecoming and unprofessional manner..."

[3] In Leah Korman (1991) SPB Dec. No. 91-04, the Board stated that the right to be notified of the charges one faces is a critical element in due process of law and revoked Korman's adverse action on the grounds that the adverse action failed to give Korman clear specific reasons as to why the action was being taken.

As to the factual allegations upon which the demotion was based, four specific incidents concerning appellant's poor driving record were added: 1) on or about June 22, 1990, appellant had one hand on female firefighter Cindy Graybill's knee while driving the fire engine and, because of this distraction, appellant had to swerve off the road to avoid hitting another vehicle; 2) on April 29, 1991, appellant took his eyes off the road to make social contact with a person in another vehicle and, in making this contact, almost drove off the edge of the road; 3) in October of 1991, appellant excessively heated his brakes while driving the firetruck at an excessive speed down the highway; and, 4) while driving Code 3 during 1990 and 1991, he regularly drove in excess of the speed limit, failed to properly focus on his driving, excessively heated his brakes and caused several near misses.

In addition, the amended demotion cited several additional instances of appellant's inappropriate behavior towards female employees. These included the following: 1) between May 7 and 28, 1990, he placed his hand on at least three occasions on firefighter Barbara Lundy's knee while driving; 2) he touched firefighter Cindy Graybill's knee while driving on June 22, 1990 and later that day allowed himself to receive a backrub from her; 3) he repeatedly touched and poked firefighter Anne Marie Tonnessen while driving his engine with her during 1990 and 1991; 4) after being told by Tonnessen not to touch her anymore, he grabbed hold of her around

the waist, on or about October 8, 1991, and swung her around. In addition, new allegations were included stating that appellant told numerous derogatory jokes against women ("dumb blond jokes") during the 1990 and 1991 fire seasons and repeatedly stared at the chests of female firefighters.

The Original Dismissal Action

On September 29, 1993, appellant was notified that he was dismissed from the position of Fire Apparatus Engineer, effective October 12, 1993. After noting that appellant was previously counselled and received a demotion for, among other things, sexually offensive comments and behavior, the Department dismissed appellant for causes of discipline of failure of good behavior [Government Code section 19572(t)][4] and unlawful discrimination, including harassment, on the basis of sex [Government Code section 19572(w)].

As basis for the dismissal action, the original notice of dismissal made general allegations of inappropriate and sexually harassing behavior, but listed only a few specific instances, all of which concerned appellant's treatment of firefighter Dawn Sparrow, a relatively new firefighter whom appellant was temporarily supervising for a few days in July of 1993. Specifically, the original dismissal action alleged that on

[4] Section 19572(t) reads: "Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the employee's agency or employment.

July 23, 1993, appellant asked firefighter Dawn Sparrow about her personal life, touched her hands and shoulders and put his arms around her. Later that same day, appellant discussed Sparrow's breast size with fellow firefighter Mike Schroeder, saying Sparrow would make a good wife. The next day, July 24, 1993, he made firefighter Sparrow straddle the gear shift while he drove the fire engine, and stated that it "was the only legal way to touch [her] leg". The notice further alleged that appellant gave Sparrow a personal business card telling her to call him for anything, pulled Sparrow's shirt sleeve down unsolicited and, finally, walked behind Sparrow and grabbed her rib cage with both hands.

On January 6, 1994, just a short time later, the Department amended the dismissal action solely for the purpose of citing three additional causes for discipline: Government Code section 19572, subdivisions (d) inexcusable neglect of duty; (m) discourteous treatment of other employees; and (o) willful disobedience. As was the case with the demotion, however, the ALJ later noted at the hearing that the dismissal contained allegations which were too general in nature to constitute charges against appellant. In response, the Department served a second amended notice of adverse action of dismissal on April 27, 1994. The amended action realleged the same instances of counselling noted in the amended demotion action, and included additional factual allegations with respect to appellant's conduct toward firefighter Sparrow.

The amended action of dismissal clarified that, while rolling down Sparrow's shirt sleeve on August 25, 1993, appellant pushed his hand against Sparrow's breast. The amended action further alleged that, on that same day, appellant placed tomatoes in Sparrow's arms, touching her breasts, even after Sparrow had asked him to leave her alone while she picked tomatoes in the station's vegetable garden. In addition, the amended dismissal action alleged the following new allegations against appellant, all of which concerned appellant's behavior toward firefighter Sparrow while supervising her for two days in July of 1993: 1) appellant watched Sparrow change her overshirt for dinner while she stood behind the fire engine for privacy; 2) appellant leered at Sparrow's breasts and told Sparrow that he loved to watch women undress in front of him; 3) appellant told Sparrow that he always takes his pretty ladies out to dinner in response to Sparrow's question as to why they were going out to eat; 4) appellant was repeatedly in Sparrow's personal space over the weekend, initiating very personal conversations; 5) appellant told fellow firefighters in front of Sparrow that she was as "pure as the driven snow"; and 6) appellant repeatedly told Sparrow she must ride in the front of the cab next to him, while he kissed and fondled her.

After both the amended actions were served, appellant was given a joint Skelly hearing and both actions were sustained by the Department.

At the conclusion of the administrative hearings, the ALJ issued a Proposed Decision finding that appellant committed numerous acts of wrongdoing, including driving irresponsibly and discriminating against and acting discourteously toward female employees and sustained both the dismissal and demotion. The ALJ further found that the amendments themselves were proper and did not find any Skelly violation.

The appellant subsequently petitioned the Board for a rehearing on several grounds. The appellant pointed to two errors in the ALJ's findings of fact, first, alleging that the appellant did not touch Sparrow in the laundry room as found in the ALJ's Proposed Decision in Paragraph XVI, and second, that Sparrow was not present when appellant made sexual remarks about her breasts as the ALJ had concluded in paragraph XXI of the Proposed Decision. The appellant also argued that he should be awarded backpay as the Department violated his due process rights under Skelly v. State Personnel Board (1975) 15 Cal.3d 175 by failing to provide him with notice of all of the charges upon which the discipline was based prior to discipline being imposed.

ISSUES

1) Is there a preponderance of evidence to sustain the demotion action as amended?

2) Is there a preponderance of evidence to sustain the dismissal action as amended, given the Department's admission that there were two mistakes in the ALJ's findings of fact?

3) If either or both actions are sustained, have appellant's due process rights been violated?

DISCUSSION

The Demotion

At the hearing on the demotion, the Department introduced several witnesses, including Captain Fred Stump, Captain Lee Winton, and Captain Tracy Dorris, who testified to having counselled appellant repeatedly, prior to the incidents which were the basis for the demotion, concerning reports of appellant's inappropriate touching of and sexually offensive remarks to female employees. Appellant was placed on notice on several instances that such behavior was inappropriate and would not be tolerated. Appellant also admitted receiving formal training on preventing sexual harassment in March of 1991, and that he received a copy of the Department's policy against sexual harassment. Appellant was also counselled regarding his poor driving record, and had received the counselling memorandum which was issued to him after the near-miss accident with a logging truck.

In all, the record reveals that appellant was the subject of counselling on numerous occasions, both concerning appellant's inappropriate actions concerning female employees and his reckless

manner of driving. Despite these warnings, appellant admitted at the hearing the following allegations which were pled in the amended demotion: at one time or another he grabbed firefighters Cindy Graybill's and Barbara Lundy's knees while he was driving the fire engine; he grabbed firefighter Tonnesson and swung her around by her waist, even when she told him to stop; he told "dumb blond" jokes to female firefighters; he pinched firefighter Cameron Smith's cheek, telling her she was "kind of cute for a girl" and later grabbed her by her jacket, pulling her face close to his to reprimand her for accusing him of goofing off.

We find such actions constitute cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty; (m) discourteous treatment of employees; and (t) other failure of good behavior. We also find these actions constitute cause for discipline under Government Code section 19572 (o) willful disobedience, as appellant had been repeatedly told not to touch female employees or otherwise engage in horseplay with them.[5]

In addition, there was ample evidence in the record that appellant regularly drove in excess of the speed limit during Code 3 responses, excessively heated his brakes when he drove the fire engine, and regularly stared at the chests of female firefighters.

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[5]We do not find cause to discipline appellant for dishonesty.

Finally, we also find a preponderance of evidence that, in October of 1991, appellant drove at a rate of speed far in excess of the legal limit and, furthermore, purposefully failed to yield to a vehicle that was trying to pass the fire engine, endangering the passenger in that vehicle as well as the passengers in the fire engine. Although appellant contends that there was insufficient room for him to pull over on the side of the road, we find ample evidence in the record from Cameron Smith to corroborate the hearsay evidence from the driver of the other vehicle that appellant was driving far in excess of the speed limit and purposefully refused to slow down or pull over, even a little bit to the side, when such action was not only possible, but necessary. Such misconduct is a serious matter, particularly given the fact that it happened less than three months after appellant received the June 1991 counselling memorandum warning him to slow down and drive more carefully. We find that such misconduct constitutes cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, and (t) other failure of good behavior.

Despite the fact that appellant was placed on notice on several occasions to drive carefully and to watch his behavior around female firefighters, he repeatedly engaged in the above acts of misconduct. The position of Captain is an extremely important one - one in which any person who holds that position must act as

leader to fellow firefighters and would be expected to model exemplary behavior. The unique nature of the firefighting business mandates that firefighters be especially trustworthy and responsible as their job entails saving lives and property and being entrusted with dangerous equipment. Moreover, given the unusual working situation endured by firefighters, having to spend long stretches at a time with coworkers, eating, sleeping and participating in daily living activities, it is imperative that firefighters can be trusted to treat each other with respect and professionalism. Unfortunately, appellant has shown through his actions that he has no business holding the position of Captain. Accordingly, we believe that appellant's demotion to the position of Fire Apparatus Engineer was appropriate under all of the circumstances and we sustain the action.

The Dismissal

As stated above, the events leading to appellant's dismissal took place over just a few days during the summer of 1993 when appellant was acting as a leadperson, supervising a crew of firefighters at the Dew Drop station. In the Proposed Decision, the Administrative Law Judge credited Sparrow's testimony and found that appellant sexually harassed Dawn Sparrow. Upon petition for rehearing, however, appellant raised the fact that two instances upon which the Proposed Decision was based were factually inaccurate: The Department failed to prove that appellant touched

Sparrow while they were discussing Sparrow's personal life in the laundry room; and, the evidence failed to establish that Sparrow was present when appellant discussed the size of her breasts with fellow firefighter Mike Schroeder. The Department agrees that these two factual errors were made in the ALJ's Proposed Decision. Even disregarding these erroneous findings, however, we find ample evidence remaining in the record to affirm appellant's dismissal as a Fire Apparatus Engineer.

We find a preponderance of evidence in the record, both in the form of Sparrow's testimony, which we too believe to be credible, and appellant's own admissions, which reveals that during the two days when appellant supervised firefighter Dawn Sparrow, he engaged in numerous acts of sexually harassing behavior toward her. Appellant watched Sparrow change her overshirt as she attempted to gain privacy by hiding behind the fire engine, telling her, "I love to watch women undress before me." He later told Sparrow before insisting on taking Sparrow and another firefighter out to dinner, "I always take my pretty ladies out to dinner." He then ordered Sparrow to sit between him and firefighter Schroeder in the front of the engine cab, even though he admitted knowing that standard policy was that only two persons were to ride in the front of the cab, and despite the fact that Sparrow repeatedly requested to be allowed to sit in the back of the truck. As a result of Sparrow being pressured by appellant to sit in the front of the cab, she

was forced to straddle the gear shift where appellant unnecessarily left his hand and repeatedly stroked and touched Sparrow as he drove along, telling Sparrow that this "is the only legal way to touch your leg."[6]

In addition to the above acts of misconduct, the record reveals that the following month (August 1993), while watching Sparrow gather tomatoes from the station's garden, appellant placed some tomatoes unsolicited in her crossed arms and, in doing so, he touched her breasts.[7] On that same day, appellant grabbed Sparrow's arm and without asking, rolled down her shirt sleeves, telling her it was against regulations to have them rolled up. Again that same day, he walked by Sparrow in the narrow hallway of the office, grabbed her around the waist, and unnecessarily moved her body over a few feet, without even first asking her if she would please move. [8]

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[6] The record reveals that the fire truck appellant was driving was an automatic. There was no need for appellant to keep his hand on the gear shift in such an embarrassing position for firefighter Sparrow.

[7] Appellant and Sparrow never saw each other after the two days they worked together in July until the day of these subsequent incidents.

[8] We do not find the fact that appellant gave Sparrow his personal business card and discussed personal matters with Sparrow in the laundry room to be actions subject to discipline. They are, however, facts which might demonstrate that appellant had more than business interests in mind when he made his contacts with firefighter Sparrow.

As set forth in Richard Jenkins (1993) SPB Dec. No. 93-18, the Board has applied the legal standards set forth under Title VII and the Fair Employment and Housing Act to determine whether conduct is sufficiently egregious to constitute unlawful discrimination on the basis of sexual harassment, and thus cause for discipline under Government Code section 19572, subdivision (w).

The United States Supreme Court confirmed the legal standard for a Title VII violation for sexual harassment in Harris v. Forklift Systems, Inc. (1993) 62 U.S.L.W. 4004, 126 L.Ed 2d 295, 114 S.Ct. 367. In Harris, the Court reiterated the holding first reached in Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, that sexual harassment is found when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. Harris v. Forklift Systems, Inc., 114 S.Ct. at 368. The Court further enunciated in Harris that sexual harassment can be found even if the victim has not suffered actual psychological injury, so long as the environment could be reasonably perceived to be hostile or abusive. The Ninth Circuit has further held that conduct must be such as to be hostile or abusive to a "reasonable woman". Ellison v. Brady (9th Cir. 1991) 924 F.2d 872.

The Harris court recognized that there exists no mathematical test for making the necessary determination, but noted several factors which can be used to determine whether an environment is

sufficiently hostile or abusive to constitute unlawful discrimination. These factors include the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc. 114 S.Ct. at 309.

Whether a person's conduct is sufficiently severe or pervasive so as to alter the conditions of a victim's employment is a question of fact. Canada v. Boyd Group, Inc. (D.Nev. 1992) 809 F.2d 771. For purposes of determining whether a reasonable woman would find her employment environment to be hostile, the courts consider that, the required showing of severity of conduct varies inversely with the required showing of frequency of conduct.

Sexual harassment under Title VII has been found actionable in cases where the offensive conduct has been found so severe and pervasive as to alter the conditions of the victim's employment and create a hostile or abusive environment. [Barrett v. Omaha National Bank (D.Neb 1985) 584 F.Supp. 22 (one incident of "groping" a passenger inside a vehicle and talking about sexual activities was sufficient for sexual harassment); Ellison v. Brady (9th Cir. 1991) 924 F2d 872 (three bizarre love letters from a coworker established a case of hostile environment); Jones v. Wesco Investments, Inc. (8th Cir. 1988) 846 F.2d 1154 (repeated touching,

single kiss and placing hand under dress on one occasion constituted sexual harassment).]

Not all incidents of sexually suggestive conduct, however, have been found to constitute sexual harassment. Instances of offensive behavior must be more than occasional, isolated, sporadic or trivial to be actionable as sexual harassment. Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 610. (See C[redacted] C[redacted] (1994) SPB Dec. No. 94-21 and T[redacted] W[redacted] (1994) SPB Dec. No. 94-20 where the Board found that the appellants' actions in each case were not severe or pervasive enough to render the victim's working environment hostile or abusive.)[9]

In the instant case, appellant made repeated sexually suggestive remarks to firefighter Sparrow in the short period of time that he supervised her. He purposefully watched Sparrow take her shirt off, despite the fact that she sought out privacy, and he made repeated sexually suggestive remarks and insinuations to her. Even worse is the fact that appellant insisted that Sparrow sit in the cab between him and firefighter Schroeder, where there was not

[9] If an employee's misconduct does not appear to meet the requisite elements to charge him or her with cause for discipline for unlawful discrimination based upon sexual harassment under Government Code section 19572, subdivision (w), cause for discipline may still be applicable, for example, under subdivision (m) discourteous treatment of the public or other employees, subdivision (t) other failure of good behavior, or subdivision (d) inexcusable neglect of duty, depending on the particular circumstances. Jose Flores (1994) SPB Dec. No. 94-24, p. 8.

sufficient room for her, and then proceeded to unnecessarily use the gear shift as an admitted excuse to stroke her.

The Equal Employment Opportunity Commission (EEOC), which administers Title VII, takes the position that a single unwelcome physical advance to a person's intimate body area can be sufficiently offensive to be actionable under Title VII.[10] Appellant's conduct in forcing Sparrow to sit next to him in the cab straddling the gear shift where he purposefully left his hand so he could touch between her legs might alone be conduct severe enough to constitute sexual harassment. When coupled though with all of the other incidents, which occurred over a two day period by one in a superior position, we believe that any reasonable woman would feel that her working environment, at least for that time spent working under appellant, was rendered hostile. Appellant's repeated attempts to tease, touch and taunt Sparrow during their short period together was sufficiently severe and pervasive enough for us to find that appellant was properly disciplined for unlawful

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[10] In a published memorandum dated March 19, 1990 entitled "Policy Guidance on Current Issues of Sexual Harassment" Notice N-915-050, the EEOC stated:

> "The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment."

discrimination, including sexual harassment, under Government Code section 19572(w).

In addition, we find that appellant's actions constituted cause for discipline under Government Code section 19572, subdivision (o), willful disobedience, as appellant willfully disobeyed the Department's policy against sexual harassment of female employees as well as the clear instructions to him from his supervisors to treat female employees with the utmost professionalism and respect and not to touch or otherwise to engage in sexually suggestive conduct towards them. We further find that appellant's actions constituted cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (m) discourteous treatment of other employees, and (t) other failure of good behavior.

As to the issue of penalty, we find that appellant's dismissal was appropriate under all of the circumstances. As set forth in the California Supreme Court case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194, there are several factors for the Board to consider in assessing the propriety of the imposed discipline. Among the factors to be considered are the extent to which the employee's conduct resulted in or, if repeated, is likely to result in harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence. Id. at 217-18.

In this case, appellant harmed a subordinate firefighter by repeatedly teasing, and then touching, her in a sexual manner so that this firefighter felt self-conscious, demeaned and apprehensive. In addition to the personal harm caused to the victim of appellant's inappropriate conduct, the Department is rendered susceptible to harm because of possible lawsuits which might be brought by the victim of such conduct.

Moreover, in addition to the seriousness of appellant's conduct is the fact that recurrence of the behavior appears likely. Appellant had been repeatedly counselled, not only about his poor driving, but about his disrespectful conduct toward females with whom he worked. Despite these repeated counselling efforts and appellant's demotion from Captain to Fire Apparatus Engineer based, in part, upon inappropriate conduct and treatment of female firefighters, appellant sexually harassed firefighter Sparrow within just months of the demotion. We see no reason for the Department to be subject to further harm based on the conduct of an employee who does not seem capable of understanding the fact that fellow employees deserve to be treated with professionalism and respect, regardless of their gender. We therefore sustain the Department's dismissal.

Skelly Violation

The appellant next argues that even if one or both of the disciplinary actions is sustained based upon the charges as

amended, he is entitled to backpay for the period of time from the date the original disciplinary actions were served until the date the amendments were filed if the charges in the original disciplinary actions would have been insufficient to sustain the discipline eventually imposed. He contends that since both the demotion and dismissal actions were substantively amended approximately two years after their original effective dates, and, if the original actions would have been insufficient to sustain the discipline imposed, backpay must be awarded for the period of time during which the appellant was wrongfully disciplined, i.e. the time during which appellant was demoted or dismissed based solely upon the original charges.

After reviewing appellant's novel argument, the Board concludes that it may rely upon the amended disciplinary actions to sustain the appellant's discipline, and that neither any statutes nor constitutional considerations of due process require that the Board award backpay to appellant, even assuming the original charges would have been insufficient to sustain the discipline.

We could find no case or statute which supports appellant's contention. On the contrary, Government Code section 19575.5 specifically grants appointing powers the right to amend notices of adverse action to present new causes or allegations up until the time that the matter is submitted to the Board for decision, so long as the appellant is given an opportunity to prepare his

defense thereto. This statute mirrors a similar statute in the Administrative Procedure Act, Government Code section 11507, which also permits the liberal amendment of pleadings during the course of administrative proceedings. Although Government Code section 19575.5 is silent as to whether the appellant is entitled to a new Skelly hearing when charges are amended, the Board has previously held, and still believes, that due process dictates that employees are entitled to notice of the charges being made against them and an opportunity to respond to those charges.[11] (See T[redacted] W[redacted] (1992) SPB Dec. No. 92-03 whereby the Board declined to rule upon the separate charge of dishonesty sought to be amended into the adverse action during the hearing as the appellant had no prior notice of the charge being made against him.)

As set forth in Caveness v. State Personnel Board (1980) 113 Cal.App.3d 617, 627:

> What Skelly requires is unambiguous warning that matters have come to a head, coupled with an explicit notice to the employee that he or she now has the opportunity to

[11] In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, the California Supreme Court held that employees are entitled to notice of the charges against them and an opportunity to have their side of the story heard by the appointing power, prior to the imposition of the discipline.

> engage the issue and present the reasons opposing such a disposition.[12]

As noted in dicta in the case of Brown v. State Personnel Board (1985) 166 Cal.App.3d 1151:

> In the absence of a procedure which permits a respondent to prepare for and contest an amended charge a serious constitutional problem arises. Brown at 1164, fn. 5.

The language in Brown, we believe, implies that the presence of a procedure for amending adverse actions to ensure that an employee has ample notice and an opportunity to be heard and prepare a defense, such as was present here, would not present constitutional problems.

In this case, appellant was clearly provided with notice of the basis for the actions and an opportunity to be heard at the time the original actions were served, as well as when the amended actions were served. Moreover, at the Skelly hearing on the amended actions, he had the opportunity to state his case as to why the additional charges should not be cause for discipline, and had the opportunity to convince the Department to drop the additional charges. We believe that, under these circumstances, the

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[12] Even then, courts have held that minor, technical amendments do not require notice of the amendments and an additional opportunity to be heard. Kristal v. State Personnel Board (1975) 50 Cal.App.3d 230; Caveness v. State Personnel Board (1980) 113 Cal.App.3d 617. That is not to say that all of the amendments in this case were minor or technical.

Department has not deprived appellant of his due process rights under the Constitution.

In addition, we believe that there are public policy, as well as practical reasons, which militate against awarding backpay under such circumstances. By holding that an employee whose adverse action is substantively amended is entitled to backpay based upon the alleged insufficiency of the original adverse action, the Board would be agreeing to apply a two-part analysis anytime pleadings are amended, effectively weighing the sufficiency of the original pleadings against the sufficiency of the amended pleadings (which should really be considered to have superseded the original pleadings). After the Board determined what the appropriate penalty was based upon the charges as amended, it would have to determine what the appropriate penalty might have been had the charges not been amended. Such an exercise would be time-consuming and confusing, turning a simple administrative hearing into a trial within a trial. More importantly, though, such a finding might serve to deter appointing authorities from amending their adverse actions, a right expressly granted appointing authorities by the Legislature.

In conclusion, we decline to award appellant backpay based upon an analysis of the sufficiency of the original demotion and dismissal actions. Due process and statutory concerns were fully met when the appellant was given notice of the amended actions and

an opportunity to be heard by the appointing power, as well as by being given the reasonable opportunity to prepare a defense to the new charges. We do not believe that the law requires anything more.

CONCLUSION

Given the Department's repeated attempts to counsel appellant, his repetitive and immature conduct with respect to his manner of driving and treatment of female employees was serious enough to warrant demotion from Fire Captain to Fire Apparatus Engineer. His sexual harassment of a subordinate firefighter, coming on the heels of his demotion, warrants dismissal as appellant has shown that the Department cannot trust him to act in the professional manner expected. Appellant's request for backpay is denied.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582, it is hereby ORDERED that:

1. The adverse actions of demotion from Fire Captain to Fire Apparatus Engineer and dismissal from the position of Fire Apparatus Engineer taken against W[redacted]. M[redacted] are hereby sustained.

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member
Alice Stoner, Member

*Member Ron Alvarado was not a member of the Board when this case was argued and did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 3, 1995.

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C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board